93-690

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

RICHARD W. PICKENS, TEXAS EXTRUSION CORPORATION AND PICKENS INDUSTRIES, INC.,
Petitioners,

V.

LOCKHEED CORPORATION, LOCKHEED FINANCE CORPORATION AND LOCKHEED CALIFORNIA CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NEW ORLEANS, LOUISIANA

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I

QUESTIONS PRESENTED

1. What is fraud on the court and what allegations state a cause?

2. When does the doctrine of res judicata apply to a Rule 60(b), Fed. R. Civ. P., independent action for fraud on the court?

3. Does a court of appeals have jurisdiction to enjoin a litigant from seeking relief in the Supreme Court of the United States?

4. Does a court of appeals have jurisdiction to issue an original injunction when there is no final or otherwise appealable decision of the district court?

5. Without articulating a legal standard, or making findings of fact, is it permissible for an appellate court to enjoin a litigant from utilizing the rights and remedies granted by the Constitution, Congress and Federal Rules of Court?

6. Is a court of appeals panel empowered to enjoin a party from filing a motion for rehearing and en banc request and order the clerk of the court to refuse to accept the filing of same?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners

Richard W. Pickens

Texas Extrusion Corporation

Pickens Industries, Inc.

Respondent

Lockheed Corporation

Affiliates

Lockheed Finance Corporation

Lockheed California Corporation

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XI

ABBREVIATIONS

All references to Petitioner include Texas Extrusion Corporation (TEC) and Pickens Industries, Inc. (PII) except where stated otherwise.

All references to Lockheed or Lockheed Corporation include Lockheed Finance Corporation and Lockheed California Company.

All references to the Appendix, attached hereto, are designated App. with the corresponding page number of the cited material.

I. JURISDICTIONAL STATEMENT

The Supreme Court is granted jurisdiction of this cause pursuant to 28 U.S.C. § 1254 (As amended June 27, 1988), Pub.L. 100-352 § 2(a), (b), 102 Stat. 662). The Supreme Court also has inherent equitable jurisdiction to review fraud on the court.[1] The cause was appealed from a final decision of a district court of the United States and the Court of Appeals for the Fifth Circuit was granted jurisdiction pursuant to 28 U.S.C. § 1291 (As amended Apr. 2, 1982, Pub.L. 97-164, Title 1, § 124, 96 Stat. 36.).

II. CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Constitution of the United States Article (III) at page 13a of Appendix.
B. 28 U.S.C. § 1651 (a) at page 15a of Appendix
C. 28 U.S.C. § 46 at page 15a of Appendix

III. STATEMENT OF CASE

On February 14, 1992, petitioner filed a complaint in the United States District Court for the Northern District of Texas, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking to set aside two prior judgments. Petitioner's allegations centered on extensive fraud on the court committed by officers of the court. On March 12, 1992, Lockheed moved to dismiss pursuant to Rule 12 (b)(6). Lockheed did not deny the allegations contained in petitioner's complaint. On March 31, 1992 all discovery was stayed. On August 4, 1992 the district court

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1. *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946); *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244-246 (1944); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 521-523 (3rd Cir. 1948)

granted Lockheed's Rule 12 (b) (6) motion and dismissed petitioner's complaint. On August 14, 1992, petitioner moved to vacate the district court judgment and to amend his complaint. On August 17, 1992, the district court denied petitioner's motion for leave to amend and to vacate judgment. Thereafter, on September 1, 1992, appeal was perfected to the Fifth Circuit Court of Appeals pursuant to the jurisdiction granted by 28 U.S.C. § 1291. Oral arguments were heard on May 5, 1993, before Judge Carolyn King, Judge Patrick Higginbotham and Judge Harold DeMoss, Jr.. The Honorable Panel rendered its opinion on May 21, 1993 and affirmed the trial court. In addition, the court entered an *original* injunction forbidding petitioner from taking any further action on the lawsuit or claims related thereto.

Lockheed did not obtain a ruling granting or denying injunctive relief in the district court. Nor did Lockheed appeal any act, failure to act or any other issue pertaining to injunctive relief. Lockheed sought *original* injunctive relief with the court of appeals through the argument presented in its brief.

Counsel of record, David Parker, Esquire, pro se, brought a petition for writ of mandamus of prohibition, on or about August 4, 1993, seeking to vacate the decision and *original* injunction entered May 21, 1993. Petitioner, Richard W. Pickens, pro se, brings the instant action.

The opinion of the Court of Appeals for the Fifth Circuit, dated May 21, 1993, is reported at 990 F.2d 1488 (5th Cir. 1993) and is reprinted in the appendix hereto, p. 1a *infra*. The memorandum decision of the United States District Court for the

Northern District of Texas (Fish, A.J.) is reprinted in the appendix hereto, p. 4a *infra.*[2]

IV. ARGUMENT

A. Overview of the Argument.

There appears to be no clearly enunciated definition which provides a litmus test for determining fraud on the court. The concept of fraud on the court is difficult to consistently apply and circuit courts have struggled with its application. However, certain indisputable principles exist which provide strong beacons through these murky waters. Petitioner's cause solidly anchors itself to these indisputable principles.

Conduct which subverts the adversary nature of legal proceedings has consistently been found to be fraud on the court. Examples are varied but include such conduct as ex parte contact with the judge, an attorney conniving to defeat his client, and fraud, or dishonesty, committed by an officer of the court. Petitioner's pleadings allege such conduct and much more. Conduct which subverts the adversary system is especially significant because it abridges the constitutional right of access to the courts. That is, a victim of such conduct has been denied access which is adequate, effective and meaningful.

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2. The district court opinion did not accurately restate the fraud on the court allegations. *Compare*, App. 6a, 7a with R.1 (Plaintiff's Independent Action). Plaintiff alleged ex parte contact other than that reviewed on the original appeal (which was much more egregious), fraud by officers of the court egregious conflicts of interest and conniving by counsel for TEC (the trustee's law firm) with Lockheed counsel to defeat TEC. Other instances of misconduct were alleged. The petition was supported with over 100 exhibits and expert opinion.

Conduct which taints the integrity of the legal proceedings, or the legal system, has repeatedly been found to be fraud on the court. Thus fraud or perjury, for example, would not be actionable as fraud on the court if committed by a non party. The same conduct committed by an officer of the court would be considered fraud on the court. Officers of the court are normally considered to be those persons who owe fiduciary duties to the court, legal system or parties. Officers of the court include judges, attorneys and trustees. The fraud, deception and untruthfulness to the court, as well as other misconduct plead by petitioner were acts committed by attorneys who were officers of the court.

Petitioner respectfully submits that he has plead misconduct which is undeniably fraud on the court. Petitioner further respectfully submits that to apply the doctrine of res judicata to such a grievous and corrupt set of facts is a departure from equitable principles developed, and followed, for well over one hundred and fifty years. Destruction of such a lengthy and well considered precedent is dangerous. Especially so now, where, as will be shown herein, the bankruptcy system is inadequately protected from insider fraud involving sums of money so substantial the economic well-being of the nation is impacted.

Petitioner also challenges the injunction issued by the court of appeals in this cause.

B. Petitioner Plead a Cause of Action For Fraud on the Court Pursuant to All Definitions Expressed by the Supreme Court and a Leading Commentator.

1. Hazel-Atlas Rule

In *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944) the Supreme Court found fraud on the court in a patent infringement case. The successful party's attorney had written an article indicating the patent was a remarkable advancement and

had arranged to have the article printed in a trade journal under the name of an apparent disinterested expert. The Supreme Court found the attorney's conduct to be a deliberately planned scheme to defraud the court.[3] Several concrete principles, which govern a claim of fraud on the court, are discernible from *Hazel-Atlas*.

First, the Supreme Court pointed out that the case concerned more than injury to a single litigant.[4] Tampering with the administration of justice "is a wrong against the institutions set up to protect the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society".[5]

It does not stretch the point to respectfully suggest that this Court has previously considered the integrity of legal proceedings, and of officers of the court, to be of paramount importance. Many lower courts and distinguished commentators are in agreement with this proposition.[6] It also seems clear that this Court will go to great lengths, and demand that lower courts do likewise,

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3. 322 U.S. at 245.

4. 322 U.S. at 246.

5. 322 U.S. at 246.

6. "The spirit of the "fraud on the court" rule is applicable whenever the integrity of the judicial process of functioning has been undercut." *Greater Boston Television Corp. v. FCC.*, 463 F.2d 268, 278 (D.C. Cir. 1971); *Park v. Park*, 123 F.2d 370 (5th Cir. 1941) (fraud committed by guardian against a ward); *Chisholm v. House*, 160 F.2d 632 (10th Cir. 1947) (trustee's reports appeared to be false or misleading) See generally, 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2870; 7 J. Moore, *Federal Practice* ¶ 60.33; Annotation, *Construction and Application of Provision of Rule 60 (b) of Federal Rules of Civil Procedure That Rule Does Not Limit Power of Federal District Court To Set Aside Judgment For "Fraud Upon The Court"*, 19 A.L.R. Fed. 761 § 12, p. 790-791.

to ensure legal proceedings are free of frauds engaged in by officers of the court.[7] It is respectfully suggested to this Court that fraud on the court occurs when officers of the court forsake their fiduciary duties or engage in perfidious, recreant or apostate behavior reflecting on the integrity of the legal proceedings.[8] Examples of such conduct, engaged in by officers of the court, and plead by Petitioner are as follows:

(1) The trustee, Daniel Stewart, Esquire, insisted that his own law firm be employed to represent both Texas Extrusion Corporation (TEC) and himself, in his role as trustee. Thus, this triangle of separate legal entities, namely, the trustee, counsel for TEC and counsel for the trustee were of the same law firm (Winstead, McGuire, Sechrest & Minick). Conflicts of interest

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7. *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3rd Cir. 1948) See, also *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575 (1946); *Bizzel v. Hemingway*, 548 F.2d 505 (4th Cir. 1977) (attorney connived to lose); *Fiske v. Buder*, 125 F.2d 841, 847-849 (8th Cir. 1942) (It is always extrinsic fraud for an attorney to fail fully to disclose to his client all material facts in any transaction in which their interests are adverse and when such fraud results in a failure of the client to defend against the claim of his attorney).

8. "A fiduciary or other related relationship between the parties in the original action or proceeding may make conduct actionable that would otherwise not be so ... where one party because of a fiduciary or other legal relationship has a duty to make a full and fair disclosure to the adverse party of relevant and material facts a failure to do so is actionable fraud. So also where the "fiduciary" practices duress upon the other party or otherwise practices a fraud or deception in violation of the relationship existing between the parties." 7 J. Moore, *Federal Practice* ¶ 60.37 [1] 60-375 (citations omitted); ... "while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." 7 J. Moore, *Federal Practice* ¶ 60.33, 60-359 (citations omitted).

seem readily apparent.[9] Each member of the triangle was an officer of the court and, as such, owed fiduciary duties. However, the fiduciary duties each member of the triangle owed to the court, or parties, are significantly different. In particular, the fiduciary duties the attorney for TEC owed to his client are quite different from the fiduciary duties the trustee owed to TEC. Different still are the fiduciary duties the attorney for the trustee owed to TEC. Basic to the entire equation is the critical fact that the role of each member of the triangle is different, their fiduciary duties are different and they can not be the same entity without a significant conflict of interest. Yet, they were all of the same entity (Winstead, McGuire, Sechrest & Minick).

(2) The conflicts of interest become even more apparent by the fact Lockheed was a defendant in an adversary proceeding filed by TEC. The adversary lawsuit was the chief asset of TEC. The bankruptcy plan, filed by Lockheed, called for the dismissal of the adversary action. The plan, filed by Lockheed, provided that TEC would be stripped of *all* assets and left penniless. Yet, the law firm of Winstead, McGuire, Sechrest & Minick as TEC's legal counsel, supported the Lockheed plan in contravention of TEC's best interest.

(3) TEC's counsel supported Lockheed's plan and breached its fiduciary duties to TEC because Lockheed, as a part of the plan, agreed to and actually did pay the legal fees claimed by TEC counsel and the trustee (Winstead, McGuire, Sechrest & Minick). To offer to pay the counsel of one's adversary during

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9. Also, other conflicts existed. Mr. Stewart was a former member of the law firm of Thompson & Knight who were, and still are, counsel for Lockheed. Further, one of the chief attorneys for Thompson & Knight, in the bankruptcy proceedings, was Bill Neary, Sr., whose son, Bill Neary, Jr., worked in the United States Trustees Office, at the time, and who is now regional director for the United States Trustees Office for the area served by the Dallas courts.

litigation destroys the integrity of the proceedings and terminates adequate, effective and meaningful access to the courts. Especially so, if the payment is accepted. Payment was accepted. Further, such conduct dishonors the essence of the proud heritage surrounding the American legal system. Such conduct is fraud on the court.

(4) Worse still, counsel for TEC connived with counsel for Lockheed to ensure the defeat of TEC. Counsel for TEC engaged in numerous conferences,[10] correspondence[11] and phone calls[12] with trustee Stewart and Lockheed counsel to design legal strategies, draft documents and briefs, plan arguments and discuss alternatives in support of Lockheed's position and to defeat the best interests of TEC. It is respectfully suggested that such conduct is definitely fraud on the court. Such conduct destroys the essence of fiduciary duties, the adversial system and adequate, effective or and, by such conduct, have become traitors to their oath as attorneys and officers of the court.

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10. See, Plaintiff's Independent Action, *Exhibit 90,* time sheets of Winstead, McGuire, Sechrest & Minick.

11. See, Plaintiff's Independent Action, *Exhibit 115* reflects that counsel for TEC informed trustee Stewart that equitable subordination was valid. *Exhibit 116* identifies that counsel for TEC asserted a legal position he knew to be incorrect (pursuant to the statement in Exhibit 115) and against his client's best interest. *Exhibit 123* reflects that the trustee, counsel for TEC and others were discussing, with Lockheed counsel, legal strategies and arguments in support of Lockheed's position. The trustee refers to *our* overall presentation (emphasis added). *Exhibits 124 & 125* reflect that the Philadelphia law firm of Pepper, Hamilton & Scheetz were discussing legal strategies, alternatives and potential legal arguments with trustee Stewart and Lockheed counsel in support of the Lockheed position. *Exhibit 126* reflects that counsel for TEC shared briefing assignments with Lockheed counsel relative to the appeal.

12. See, Plaintiff's Independent Action, Exhibit 90, supra.

(5) Further, trustee Stewart had a unique relationship with the bankruptcy judge which allowed ex parte contact. Judge Ford had at least two ex parte meetings with trustee Stewart. At the first meeting, Judge Ford indicated he did not want TEC shut down and that he wanted a break-even analysis done. Within less than three weeks, trustee Stewart, in the second known ex parte meeting, *untruthfully* told Judge Ford that TEC was below break-even and that TEC must be shut down immediately without notice. As harmless as Judge Ford may have thought such ex parte contact was, it did grave harm to TEC and was a denial of due process and adequate, effective and meaningful access to the courts. Once Judge Ford exercised his discretion to require a break-even analysis and directly monitor whether TEC should be shut down, his judicial obligations prohibited ex parte contact with the trustee. Had Judge Ford's ex parte meetings with trustee Stewart been in open court, with petitioner present, petitioner could have exercised his full right of access to the courts. For example, petitioner could have developed a break-even analysis, by experts, to rebut trustee Stewart's report, or sought to require trustee Stewart to reduce this report to writing, or sought to cross-examine trustee Stewart or sought a full evidentiary hearing, or requested notice of shutdown, or stay of shutdown.

(6) Prior to the confirmation hearing, petitioner sought to amend the lawsuits against Lockheed to add anti-trust violations including anti-trust conspiracy claims against Lockheed and members of the aluminum industry. The bankruptcy court refused to allow the amendment. The bankruptcy plan, filed by Lockheed, required that TEC and petitioner execute a release of all claims against Lockheed. In addition, the plan called for the bankruptcy court to dismiss the adversary claims TEC had against Lockheed and the district court was to dismiss the personal lawsuit dealing with the same matters. Shortly after the confirmation hearing, the creditors' committee attorney (counsel paid by Lockheed) sought to invoke Rule 7070 (Rule 70 Fed. R. Civ. P.) to appoint someone other than petitioner to sign the release documents. At such time,

neither petitioner nor his attorney, had seen or been given copies of the release documents. The court granted the Rule 7070 motion. A few days later the release documents were signed, but *not* by petitioner personally. Contained within the release documents was an assignment which assigned all claims petitioner and TEC had, including anti-trust claims. The assignment clause did not exist, nor was it mentioned or evaluated for its value, in the disclosure statement, the bankruptcy plan, the confirmation hearing, the bankruptcy court's oral findings of fact and conclusions of law, the bankruptcy court's written findings of fact and conclusions of law or the confirmation order. The assignment clause was fraudulently inserted in the release documents by officers of the court and such conduct is, at the least, a fraud on the court. The assignment clause assigned the anti-trust claims petitioner and TEC held against one conspirator to another conspirator within the same anti-trust conspiracy. Further, the assignment gave a valuable asset to Lockheed without consideration. It is respectfully submitted that the assignment should be void as to public policy and the circumstances surrounding the assignment are a fraud on the court. Further, petitioner requested a jury trial on the anti-trust claims and moved for withdrawal of reference of the corporate lawsuit from the bankruptcy court. It would seem that the bankruptcy court did not have jurisdiction to dispose of and assign anti-trust claims against non parties even if the claims had been included in the proceedings. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *In re Jensen*, 946 F.2d 369 (5th Cir. 1992).

This Court, in *Hazel-Atlas*, also stated that there are "issues of great moment to the public in a patent suit".[13] Likewise, it is respectfully suggested that bankruptcy proceedings provide issues of great moment to the public. From 1988 through 1991, the top twenty-five bankruptcy cases had corporate assets of over

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13. 322 U.S. at 245.

$190,000,000,000.00 the year before bankruptcy was filed.[14] Additionally, in 1991, well over one million bankruptcy cases were pending, including over eight hundred thousand new cases filed by individuals and corporations.[15] The impact in dollar amount, number of cases and public well-being is staggering.

Even though literally billions of dollars of assets are funneled through the bankruptcy system, the bankruptcy system is poorly supervised. A General Government Division (GAO) report states, "The trustee system is vulnerable to fraud because of the large number of trustees who administer tens of billions of dollars in estate funds and the limited resources available to conduct and thoroughly follow-up on trustee audits and reports."[16] The extent of trustee fraud is unknown because no one collects such data.[17] However, the Office of Management and Budget (OMB) has designated the oversight and monitoring of bankruptcy trustees as "high risk" in terms of vulnerability to fraud and abuse in government operations.[18]

The potential for bankruptcy fraud is further heightened because cases are resolved outside the arena of public attention. Jury trials have not been allowed and assets are disposed of by officers of the court who are primarily lawyers. Some journ-

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14. D. Barlett & J. Steele, *America: What Went Wrong?*, at 70-71 (1992).

15. Source: Administrative Office of the U.S. Courts, *Annual Report of the Director.*

16. United States General Accounting Office, *Report to the Chairman, Subcommittee on Economic and Commercial Law, Committee on the Judiciary, House of Representatives*, GAO/GGD-93-54 *Bankruptcy Trustee Fraud* (1993), at 6.

17. Supra, GAO/GGD-93-54 Bankruptcy Trustee Fraud (1993), at 7.

18. Supra, GAO/GGD-93-54 Bankruptcy Trustee Fraud (1993), at 6.

alists[19] and public figures[20] have begun to speak out against the bankruptcy system alleging it is riffled with cronyism and fraud, and controlled by a group of major law firms who misuse the system for their own good.

Such governmental and public criticism points to certain facts that are indisputable. First, billions of dollars in assets go into the bankruptcy system each year. Second, the bankruptcy system contains virtually no supervision by any agency capable of properly monitoring the rapid fire movement of assets and legal fees. Third, the potential for fraud involving inordinately large sums of money on an extensive basis is a "high risk". Fourth, the best hope for controlling fraud until Congress, and the public, make changes is by stern enforcement of the fiduciary duties officers of the court owe to their clients and the system. It is respectfully suggested that this court must require that lower courts observe the historical significance of fiduciary duties and sternly enforce penalties for fraud, by officers of the court, in order to avoid a significant potential for disaster. Honesty, integrity and observance of fiduciary duties must be demanded of officers of the court. Violations must be swiftly, decisively and sternly punished. Petitioner's case represents the opportunity to rediscover values of respect and integrity forgotten by some in the legal profession.

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19. Norman, *Death in Sausalito*, Forbes, November 12, 1990, at 180; D. Barlett & J. Steele, *America: What Went Wrong?*, at 66-87.

20. Chairman Jack Brooks of the House Judiciary committee has been a frequent critic over the last several years. For example, see November 6, 1991 News Release, *Brooks Requests G.A.O. Probe of Justice Department's U.S. Bankruptcy Trustee System*.

2. The Throckmorton Rule

In *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878)[21] this Court defined fraud on the court as follows:

> But ... in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent ... where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, where the authority regularly employed corruptly sells out his client's interest to the other side, -- these, and similar causes which show that there has never been a real contest in the trial ... are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair trial.

The examples of fraud on the court, given in *Throckmorton*, were plead by petitioner and discussed previously. Accordingly, petitioner plead a cause under the *Throckmorton* rule.

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21. Some courts have expressed the opinion that *Throckmorton* was overruled by *Marshall v. Holmes*, 141 U.S. 589 (1891). *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987); *Gleason v. Jandrucko*, 860 F.2d 556 (2nd Cir. 1988.), the principal issue being whether fraud on the court may be established through a showing of intrinsic fraud, or requires the showing of extrinsic fraud. The issue is of little significance in these proceedings because the fraud alleged by petitioner is almost exclusively extrinsic.

3. The Suggested Definition Promulgated by a Leading Legal Commentator.

A leading commentator suggests the following definition of fraud on the court:

> ..." that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication ..."[22]

It is respectfully suggested that the ex parte contacts, conflicts of interest, breach of fiduciary duties and fraud surrounding the insertion of the assignment clause are frauds on the court as defined by Professor Moore.[23]

In conclusion, petitioner respectfully submits that he plead a cause of action for fraud on the court and presented uncontested exhibits proving such fraud.

C. Res Judicata Does Not Apply to Petitioner's Rule 60(b) Independent Action Which Pleads Fraud On the Court.

In *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974) the district court dismissed a Rule 60(b) motion because "the judgment entered herein is res judicata as to any issue which was or could have been raised in the initial proceedings". The court of appeals reversed the district court and stated ..."the doctrine of res

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22. 7 J. Moore, *Federal Practice* ¶ 60.33 at 60-360.

23. Additional acts constituting fraud on the court and exhibits supporting same were plead and submitted with petitioners original complaint and are too voluminous to present herein.

judicata does not preclude a litigant from making a direct attack [under Rule 60(b)] upon the judgment before the court which rendered it." 500 F.2d 701. Likewise, in *Bros Incorporated v. W.E. Grace Manufacturing Company*, 320 F.2d 594 (5th Cir. 1963) the court faced with a cause which had been appealed to three separate circuits with multiple judgments defined the facts surrounding the res judicata issue as follows:

> ..."presents difficult problems concerning the extent to which courts within the 5th Circuit may properly re-examine under equitable doctrines an earlier judgment entered in Texas on principles of res judicata on the basis of an Ohio judgment ... subsequently affirmed by the 6th Circuit under orders denying efforts to re open the case to prove facts subsequently ascertained"... 320 F.2d at 597.

The court, in *Bros Inc.*, went on to express the opinion that equitable relief was available, and res judicata principles would not apply, if (a) the parties are available and (b) controlling equitable principles are satisfied by the facts. 320 F.2d at 606. As such, the court insisted that even though a judgment had been entered based on the application of res judicata to an earlier judgment, the availability of equitable relief remained[24] and further stated as follows:

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24. Lockheed counsel alleged to the district court and appellate court that several previous actions provide res judicata relief. While *Bros Inc.* clearly demonstrates the invalidity of such reasoning, it is worthwhile to expose the flimsy nature of such argument. Lockheed lists seven cases. Respondent's Brief, 5th Circuit, Attachment B. Cases listed as 1. and 2. are the original proceedings and of course could not be res judicata to a Rule 60(b) action since Rule 60(b) expressly exists to directly attack a final judgment. Case 3. and 5. relied on res judicata and collateral estoppel of case 1. and 2. and therefore did not reach the merits (see, *Bros Inc*, supra). Case 4. is the instant lawsuit. Case 6. was a malpractice action solely against the original law firm of petitioner and was successfully concluded. However, no issue relating to

> ..." a double judgment has no double immunity or double insulation. Two stand no better, or worse, than a single judgment. And, of course, as to a single judgment 'A court exercising equitable jurisdiction can properly grant relief from any kind of judgment and against the judgment of any court' Restatement, Judgments, § 114" (note omitted). 320 F.2d 606.

Petitioner respectfully submits that res judicata is not, and logically can not be, the issue. If res judicata were to control, then *Hazel-Atlas*, *Throckmorton*, and those cases upon which *Hazel-Atlas* and *Throckmorton* relied, and those cases following such long rich lines of judicial heritage must fall, for such cases are indistinguishable from this cause. The decisive issue, at this stage, must be whether or not did petitioner plead a cause for fraud on the court.[25] Or, could he have plead a cause with proper amendment.[26] As shown, clearly the answer is affirmative. For

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24. (. . . continued)
res judicata or collateral estoppel could possibly be relevant to this simple malpractice action concerning negligence. Case 7. was never filed, in that, the 5th Circuit refused to grant leave to allow the filing of this *original action* before the appellate court.

25. A motion under Rule 12(b)(6) should be granted only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Campbell v. Wells Fargo Bank, N.A.* , 781 F.2d 440, 442-43 (5th Cir. 1985). Plaintiffs' allegations must be accepted as true. *Abdul-Alim Amin v. Universal Life Insurance Company of Memphis , Tennessee*, 706 F.2d 638, 640 (5th Cir. 1983).

26. The court should also give the plaintiffs an opportunity to amend their complaint, rather than dismiss it, if it appears that amendment may cure the defect. *Dussouy v. Gulf Coast Investment Corporation*, 660 F.2d 594, 597-99 (5th Cir. 1981).

over one hundred years, this Court has consistently held that res judicata does not apply when there is fraud on the court. It is respectfully suggested that now, more than ever, this precedent should be followed.

D. The Injunction, Issued by the Appellate Court, Assumes Jurisdiction Specifically Prohibited by Article 3 of the Constitution, Exceeds the Jurisdiction Authorized by Congress and Violates Petitioner's Right of Access to the Courts.

The appellate court's original injunction forbids petitioner "... from taking any action or filing any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of action heretofore asserted or existing ..." (App. 1a). The express terms of the injunction forbid "taking any action" or "filing any pleading". Filing a petition for writ of certiorari to this Court is both "taking action" and "filing a pleading". The injunction either specifically forbids, or unconstitutionally "chills", petitioner's right of access to the courts[27] through enjoining his right to petition this Court.[28] Access to the

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27. "The right of access to the courts is constitutionally protected." *McKay v. Hammock*, 730 F.2d 1367, 1375 (10th Cir. 1984). "Access to the courts is a fundamental right of every citizen". *Harrison v. Springdale Water & Sewer Com'n.*, 780 F.2d 1422, 1427 (8th Cir. 1986); *See also, Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986), *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (citing *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907)).

28. The right of access to the courts may not be improperly intimidated or chilled. *Harrison v. Springdale Water & Sewage Com'n*, 780 F.2d 1422, 1428, (8th Cir. 1986) (citing *Sanders v. St. Louis*, 724 F.2d 665, 666 (8th Cir. 1983); *Garland v. Polley*, 594 F.2d 1220, 1223 (8th Cir. 1979); *Hall v. Sutton*, 755 F.2d 786, 787 (11th Cir. 1985); *Matzker v. Herr*, 748 F.2d 1142, 1150-51 (7th Cir. 1984)).

courts must be "adequate, effective and meaningful". *Bounds v. Smith*, 430 U.S. 817, 822 (1977). The right of access to the courts is no longer adequate, effective and meaningful when it can be denied arbitrarily or in contravention of constitutional provisions. A deliberate denial of the right of access to the courts to pursue a civil appeal is a deprivation of a substantive constitutional right found in the first amendment, as well as the potential deprivation of substantive and procedural due process. *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986) Further, such denial is arbitrary when it is not based on rules of law and facts. The court's denial of the right to petition this Court is arbitrary and a denial of substantive constitutional rights.

The injunction, through its language denying petitioner the right to petition this Court, is an assertion of superiority over the Supreme Court, Congress and the Constitution. That is, the Constitution of the United States,[29] decisions of the Supreme Court of the United States[30] and regulations made by Congress[31] are the *only* sources empowered to define the Supreme Court's jurisdiction. Any inferior court which attempts to deny the Supreme Court's power to hear a case or controversy is exceeding its jurisdiction.

Should the Court allow the use of such injunctions to prohibit petitioning to the Supreme Court, the Supreme Court would no longer fulfill its role as the "one Supreme Court".[32] The

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29. U.S. Const. art. III § 2

30. *Marbury v. Madison*, 5 U.S. (1 Branch) 137 (1803); *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

31. U.S. Const. art. III § 2.

32. 28. U.S. Const. art. III § 1

Supreme Court is not "Supreme" if lower courts have exclusive power to determine what cases the Supreme Court will be allowed to hear. Such a precedent, as created in this case, is dangerous.

Constitutional considerations aside, the All Writs Act, 28 U.S.C. § 1651(a), is not an independent grant of jurisdiction[33] and does not enlarge jurisdiction.[34] Accordingly, the court of appeals is without statutory jurisdiction to enjoin petitioning to the Supreme Court. The court of appeals' equitable, or supervisory, powers do not, it would seem, extend to enjoining petitioning to a higher court, since the court of appeals has no supervisory power over the Supreme Court.

E. The Injunction, Issued by the Appellate Court, Violates 28 U.S.C. § 46(c) Through Denying the Fifth Circuit the Means to Convene En Banc in a Situation Where En Banc Review Is Required.

The panel decision specifically forbids petitioner from filing a motion for rehearing or for en banc consideration (App. 2a,3a). Further, the clerk of the court is ordered not to accept for filing any motion for rehearing or en banc consideration without the express approval of a judge of the court (App. 2a,3a). Petitioner can not seek the express approval of a judge of the court to file a motion for rehearing or en banc consideration because he is forbidden to take *any* action concerning *any* matter

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33. "The All Writs Act is not an independent grant of jurisdiction to a court ..."*Telecommunications Research & Action v. F.C..C..*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citing *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968); *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906)).

34. *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 367 (7th Cir. 1983); *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979).

or issue of any nature arising from or connected with the litigation (App. 2a)(emphasis added). Accordingly, it is impossible for petitioner to seek en banc review of the panel's decision.

28 U.S.C. § 46(c) authorizes the various circuits to hear cases and controversies in panels composed of three judges unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. Specifically, the authorization for each circuit to sit as panels of three is conditioned and limited. The court's injunction forbids petitioner from seeking the en banc hearing authorized by 28 U.S.C. § 46(c). As such, the court has exceeded its authorized exercise of jurisdiction through forbidding use of the procedure necessary to effectuate the dictates of 28 U.S.C. § 46(c). The very existence of the panel's authority to hear the case hinges on there not being a majority vote for en banc review. The panel's injunction, which enjoins use of the very procedure which determines whether the panel is authorized to exist, exceeds the panel's lawful jurisdiction. The Fifth Circuit's convening of an en banc court is, of course, discretionary. However, the authorization to convene upon majority vote of active circuit judges is not discretionary. Any decision to convene, or not, by any method other than as authorized by 28 U.S.C. 46 (c) violates the statute and should be void.

The ability to petition the court for en banc review is important because the decision of the panel conflicts with an earlier decision of the Fifth Circuit.[35] In *Exhibitor Poster Exchange*, the court held that an *original* injunction could not be issued by an appellate court because there was no appealable decision of the district court and the injunction was not in furtherance of the court's jurisdiction (543 F.2d at 1107).

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35. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation*, 543 F.2d 1106 (5th Cir. 1976).

Lockheed sought an original injunction through argument presented in its brief.[36] Lockheed admitted the apparent conflict of its request with the decision in *Exhibitors Poster Exchange*. However, Lockheed argued *Holloway v. Navarro*[37] and *Green v. Carlson*[38] had not followed *Exhibitors Poster Exchange*. If, *Exhibitors Poster Exchange* remains as valid precedent for the Fifth Circuit, the instant cause stands in stark contradiction. As such, both petitioner and the court en banc would have suffered, from the appellate panel, a usurpation of judicial power, abuse of discretion and a direct violation of court rules and precedent.[39] Further, due to the injunction's prohibitions, the Supreme Court is the only court which is empowered to grant relief.

First, it is almost certain that the court, in *Holloway v. Navarro* was unaware of the holding in *Exhibitors Poster Exchange*. The court determined not to publish the decision pursuant to Local Rule 47.5[40] and its opinion directly contra-

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36. Lockheed's Opening Brief at page 31, note 26.

37. *Holloway v. Navarro*, Appeal No. 91-1541 (5th Cir. 1992) (unpublished) (App. 9a).

38. 649 F.2d 285 (5th Cir. 1981)

39. *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) ("In this circuit one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc consideration or superseding decision of the Supreme Court.")

40. The court stated as follows: "Local Rule 47.5 provides: ' The publication of opinions that have *no precedential value* and merely decide particular cases on the basis of *well-settled principles* of law imposes needless expense on the public and burdens on the legal profession.' Pursuant to that Rule, the court has determined that this opinion should not be published." *Holloway v. Navarro*, Appeal No. 91-1541 (5th Cir. 1992) (emphasis added) (unpublished) (App. 10a).

dicted a prior panel's decision. It is highly unlikely that the court intentionally violated Local Rule 47.5 and the Fifth Circuit rule that one panel may not overrule another panel. The panel could not have been aware of *Exhibitors Poster Exchange*. Accordingly, the unpublished decision should carry no precedential weight since the panel did not receive the benefit and wisdom of the holding in *Exhibitors Poster Exchange*. Nor did the panel have the opportunity to distinguish, or request en banc consideration to overrule *Exhibitors Poster Exchange*, as required by Fifth Circuit rules and decisions.

Second, the court, in *Green v. Carlson*, invoked "*its* general supervisory power to control *its* docket"[41] (emphasis added). The court did not enjoin Green nor did the court order the district court to enforce injunctive relief against Green. Instead, the court limited what the clerk for the Fifth Circuit could accept for filing relative to writs of habeas corpus or mandamus and delineated when Green could not proceed in forma pauperis. Further, the court *advised* the district court as to what could be done relative to any future filings by Green. The court left open to the district court the discretion to enjoin.

For the reasons stated above, it appears *Exhibitors Poster Exchange* remains valid precedent. Since the appellate court's decision, in the instant cause, refused to follow *Exhibitors Poster Exchange*, Fifth Circuit rules require en banc review and petitioner should be granted the right to petition for en banc hearing.

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41. 649 F.2d at 287.

F. The Injunction, Issued by the Appellate Court, is Silent As to the Reasons For Its Issuance, and the Court's Decision Makes No Findings of Fact or Conclusions of Law. As Such, the Injunction Is a Clear Abuse of Discretion.

Once the appellate court accepted original jurisdiction to issue the injunction, it had the duty to determine the applicable law, relevant facts and apply the law to the facts. The appellate court wholly failed to perform its duty in each required area.

Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure apply to permanent injunctions. *Alberti v. Cruise*, 383 F.2d 268, 271 (4th Cir. 1967) (citing *Hook v. Hook & Ackerman Inc.*, 213 F.2d 122, 130 (3rd Cir. 1954)). *See* 4 Moore's *Federal Practice* ¶ 52.07, p. 2668 (2d ed. 1966) (1966 Supp.) *Now, see* 5A Moore's *Federal Practice* ¶ 52.07 p. 52-151. The injunction, issued by the court of appeals, complies with neither rule.

Of course, the Federal Rules of Civil Procedure apply to district courts.[42] However, Rules 52(a) and 65(d) were developed for original proceedings, and they are adaptations of the procedures and safeguards developed from the common law. If it is permissible for the appellate court to conduct original proceedings, the court should be required to follow the rules developed for original proceedings. The original injunction fails to make the findings and conclusions required by Rule 52(a) and fails to set forth reasons for the injunction as required by Rule 65(d). A district court's issuance of an injunction identical to the appellate court's injunction would be a clear abuse of discretion.[43]

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42. Rule 1 of the Federal Rules of Civil Procedure.

43. *In Re Powell*, 851 F.2d 427, 431-434 (D.C. Cir. 1988); *De Long v. Hennessey*, 912 F.2d 1144, 1147-1149 (9th Cir. 1990); *Mitchum v. Purvis*, 650 F.2d 647, 648 (5th Cir., Unit B, 1981).

The court of appeals should not have the discretion, *in original proceedings*, to disregard the rules it is duty bound to impose on district courts.

Since the court made no findings in support of the injunction, it is difficult to ascertain the standards applied, or rationale used, to support the injunction. No court has ever found that petitioner has been involved in litigation which was frivolous, harassing or brought for some improper purpose. Nor has there ever been a finding that petitioner was excessively litigious, even though this, standing alone, would be insufficient.[44] Other courts, in considering similar injunctions have ruled that findings are essential, and Rules 52(a) and Rule 65(d) of the Federal Rules of Civil Procedure require findings and enunciation of the reasons for the injunction. *In Re Powell*, 851 F.2d 427, 431 (D.C. Cir. 1988); *De Long v. Hennessey*, 912 F.2d 1144, 1147-1148 (9th Cir. 1990). Here, however, neither the record of prior litigation nor the instant litigation support such findings. More importantly, no such findings exist.

If the court's rationale for the injunction was the affirmance of the district court's finding of res judicata, such a rationale is inadequate to support the issuance of an injunction. An assertion of petitioner's legal rights, standing alone, is insufficient grounds for the issuance of the court's injunction.[45] Petitioner brought the

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44. . . ."mere litigiousness alone does not support the issuance of an injunction." *In Re Powell*, 851 F.2d 427 (D.C. Cir. 1988) (cites omitted). *Also see Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (cites omitted). . ."multiple filings alone can not be a predicate to a finding of frivolousness." *In Re Powell, supra*, 851 F.2d at 434, note 14.

45. Otherwise, such constitutional rights as due process and the right of access to the courts would be without meaning or substance, for these rights could be barred for no other reason than that they were exercised. Further, a number of courts have held that litigiousness alone does not support the issuance of an injunction. *In Re Powell*, 851 F.2d 427, 434 (D.C. Cir. 1988)

instant suit pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for, inter alia, fraud on the court. That is, petitioner asserted a legal right granted to him pursuant to Rule 60(b). By definition, Rule 60(b) encompasses situations where res judicata would apply *but for* the exceptions to res judicata allowed pursuant to Rule 60(b). Affirming the district court on the basis of res judicata does not imply that petitioner was attempting to circumvent the doctrine of res judicata in any improper manner or method not specifically allowed pursuant to Rule 60(b).

Further, it is respectfully suggested that when a court enjoins a litigant's access to the court, a more stringent standard should be applied both to the original findings in support of the injunction and in the appellate review process. At least one court of appeals, while supporting standards for injunctions, has indicated such standards may be lowered when the right of access to the courts is involved.[46] However, this Court reasoned, in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), that the required adequacy of the procedural protections of the due process clause increase in proportion to the significance of the interest at stake. It seems to follow that the right characterized as "the right conservative of all other rights",[47] "among the most precious of

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45. (. . . continued)
(citing *Ruderer v. United States*, 462 F.2d 897, 899 (8th Cir.) (per curiam), *cert. denied*, 409 U.S 1031 (1972)). *See also*, *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (cites omitted). If litigiousness alone does not support the issuance of an injunction, an assertion of legal rights, standing alone, can not support the issuance of an injunction.

46. *In Re Martin-Trigona*, 737 F.2d 1254, 1262 (2nd Cir. 1984) (finding that irreparable injury and inadequate relief at law, do not apply to issuance of injunction against a vexatious litigant).

47. *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907).

the liberties safeguarded by the Bill of Rights"[48] and "having a sanctity and a sanction not permitting dubious intrusions"[49] should require greater scrutiny, rather than less, before denial.

The court's decision articulates no standards or conclusions relative to the basis for the injunction. Nor does the court make findings of fact in support of the injunction. Without either conclusions of law or findings of fact, there is, of course, no application of the law to the facts. "If the record does not provide a sufficient basis to ascertain the legal and factual grounds for issuing the injunction or if the findings are inadequate to explain the basis for that ruling or to permit meaningful review, the appellate court must vacate the injunction and remand to the district court for further findings." *Professional Plan Examiners of N.J. v. Lefante*, 750 F.2d 282, 289 (3rd Cir. 1984) (citing *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1248-1239 (3rd Cir. 1980): 5A J. Moore, *Federal Practice* ¶ 52.06 [2] at 52-153). *See also White v. Carlucci*, 862 F.2d 1209, 1210-1211, note 1 (5th Cir. 1989).

G. Procedural Matters

Petitioner, pro se, has standing to bring the claim of fraud on the court on behalf of TEC, PII and himself. *Kupferman v. Consolidated Research & Mfg. Co.*, 459 F.2d 1072 (2nd Cir. 1972) (former director of defunct corporation being personally sued, raised fraud on court issue . . . court held that a finding of fraud on the court empowers the district court to set aside the judgment sua sponte, and that the director had standing to suggest that it do so). Also see *U.S. v. International Tel. & Tel. Corp.*,

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48. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967).

49. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

349 F.Supp. 22 (D.C. Conn. 1972) *affirmed* 410 U.S. 919; 7 J.Moore, *Federal Practice* ¶ 60.33 at 60-353,354; 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2870 at 250 note 59.

There is no time limit on setting aside a judgment for fraud on the court. In fact, *Hazel-Atlas*, supra and *Bros Inc.*, supra, and many other cases were as old or much older than the instant cause. See, 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2870 at 250 note 61. Further, laches nor diligence, though never raised, do not apply to fraud on the court. See, generally 7 J. Moore, *Federal Practice & Procedure* § 60.33 at 60-355 to 358.

The Supreme Court may find, from the record, fraud on the court. *Hazel-Atlas*, supra, 322 U.S. at 245-6. Especially so, where, as here, the defendant has not denied the material allegations of petitioner, or the exhibits submitted, even though numerous opportunities have existed for defendant to so deny. Should this Court find fraud on the court, from the record contained herein, it is respectfully submitted that the appropriate remedy is "a complete denial of relief" (322 U.S. at 250) including the entry of a default judgment against Lockheed as to all issues of liability and thereafter trial by jury, after proper amendment, on plaintiffs' damages for fraud, conspiracy, anti-trust violations, breach of contract and all matters related to such prior proceedings, and statutes or common law claims, providing for relief to plaintiffs.

PRAYER

For the foregoing reasons, petitioner prays:

1. That the appellate court's injunction, judgment and decision and the district court judgment be in all things reversed; and,

2. That this Court find fraud on the court and deny all relief to defendant, return this cause to the district court for trial by jury, after plaintiffs' amendments, and specifically grant the relief prayed for in plaintiffs' Independent Action; *alternatively*, petitioner prays this cause be returned to the district court for trial under the conditions and circumstances this Court deems appropriate; *alternatively*, petitioner prays that this cause be returned to the appellate court and petitioner be granted 30 days to file a motion for rehearing and suggestions for rehearing en banc and normal time for petitioning this Court to begin in conformity therewith; and,

3. That the Supreme Court consider, and if deemed appropriate, investigate this matter pursuant to the Court's equitable powers;[50]

4. That petitioner have costs and such additional relief and process as may be necessary and appropriate.

Respectfully submitted,

Richard W. Pickens

Richard W. Pickens, *Petitioner*
Pro Se

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50. *Universal Oil co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946); *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244-246 (1944); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 521-523 (3rd Cir. 1948).

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

RICHARD W. PICKENS, TEXAS EXTRUSION CORPORATION
AND PICKENS INDUSTRIES, INC.,
Petitioners,

V.

LOCKHEED CORPORATION, LOCKHEED FINANCE CORPORATION AND LOCKHEED CALIFORNIA CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NEW ORLEANS, LOUISIANA

APPENDIX

Richard W. Pickens, *Petitioner*
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PICKENS v. LOCKHEED CORP.

Richard W. Pickens, et al.,
Plaintiffs-Appellants,

v.

LOCKHEED CORPORATION, et al.,
Defendents-Appellees

No. 92-1744.

United States Court of Appeals
Fifth Circuit

May 21, 1993

Debtors brought action seeking to set aside part or all of the provisions of confirmed joint plan of reorganization. The United States District Court for the Northern District of Texas, A. Joe Fish, J., denied relief, and debtors appealed. The Court of Appeals held that res judicata barred debtors' claims.

Affirmed.

Bankruptcy - 3568(2)

Res Judicata barred debtors from seeking to set aside part or all of the provisions of joint plan of reorganization that was confirmed by bankruptcy court and affirmed on appeal; debtors' claims either could have been brought in many previous proceedings, or they were brought and ultimately rejected.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges,

PER CURIAM:

This case is the latest and last of a series of cases brought by Richard W. Pickens ("Pickens"), Texas Extrusion Corp. ("TEC") or Pickens Industries, Inc. ("PII") seeking to set aside part or all of the provisions of a joint plan of reorganization applicable to Pickens, TEC and PII which was confirmed by the Bankruptcy Court for the Northern District of Texas in 1984 and affirmed by this Court in *Texas Extrusion Corp. v. Lockheed Corp.*, 844 F.2d 1142 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed. 2d 330 (1988). The district court denied relief here on the basis, *inter alia*, that all the claims in the lawsuit were barred by the doctrine of *res judicata* and on the basis that the lawsuit was not brought within six months of the entry of the order approving the joint plan of reorganization as required by 11 U.S.C.§ 1144. The district court was indisputably correct in dismissing this case. All the claims asserted by Pickens, TEC and PII either could have been brought in the many previous proceedings or they were brought and ultimately rejected.

Although we would be justified in assessing sanctions against Pickens, TEC and PII as Lockheed has requested, we have elected not to do so. Our decision, however, is without prejudice to Lockheed's right to re-urge the imposition of sanctions should Pickens, TEC or PII attempt to act in contravention of the order and judgment rendered herein.

We expressly forbid Pickens, TEC and PII, and each of them, from taking any action or filing any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of action heretofore asserted or existing between Pickens, TEC or PII, on the one hand, and Lockheed Corporation or any of its affiliates, on the other hand. Without

first obtaining the express approval of a judge of this Court, neither the Clerk of this Court, nor the clerk of any district court or bankruptcy court within the Fifth Circuit shall accept for filing any pleading or other document proffered by or on behalf of Pickens, TEC or PII as to any such matter or issue, including, without limitation, motions for rehearing or rehearing en banc in connection herewith, which we expressly forbid them to file.

The judgment of the district court is AFFIRMED and the mandate shall issue forthwith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD W. PICKENS, ET AL Plaintiffs, VS. LOCKHEED CORPORATION, ET AL., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 3:92-CV-0302-G

MEMORANDUM ORDER

Before the court is the motion of defendants, Lockheed Corporation, Lockheed Finance Corporation, and Lockheed California Corporation (collectively, "Lockheed"), to dismiss this case under Fed. R. Civ.P.12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the motion is granted.

A motion under Rule 12(b)(6) should be granted only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442-43 (5th Cir.), cert. denied, 476 U.S. 1159 (1986); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-

pleaded facts in the complaint and construe the complaint liberally in favor of the plaintiffs *Abdul-Alim Amin v. Universal Life Insurance Company of Memphis, Tennessee*, 706 F.2d 638, 640 (5th Cir. 1983). The court should also give the plaintiffs an opportunity to amend their complaint, rather than dismiss it, if it appears that a more carefully drafted complaint might state a claim upon which relief could be granted. *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985). *See also Dussouy v. Gulf coast Investment Corporation*, 660 F.2d 594, 597-99 (5th Cir. 1981).

On February 14, 1992, plaintiffs filed the instant complaint entitled "Independent Action" seeking, under Fed. R. Civ. P. 60(b), to set aside a number of prior judgments for alleged fraud on the court. The judgments plaintiffs seek to set aside were entered more than one year prior to the filing of the instant action.

Rule 60(b) provides, in pertinent part, that it does not limit the power of the court "to set aside a judgment for fraud upon the court." The Fifth Circuit has held, however, that relief on this ground "is reserved for only the most egregious misconduct," and that the party seeking relief must show the existence of "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.), cert. denied, 493 U.S. 977 (1989) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). *See also Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 836-37 (5th Cir. 1980) ("[o]nly a small number of those acts that can be considered fraud amount to `fraud upon the court'"). The fraud must "`defile the court itself, or [be] a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner.'" *Kerwit*, 616 F.2d at 837 (quoting 7 MOORE'S FEDERAL PRACTICE ¶ 60.33 at 511 (1971 ed.)). *See also Bulloch v. United States*, 763 F.2d 1115, 1121 (10th

Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (fraud on the court found only "where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function"); *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969) ("[e]xamples [of fraud on the court] are bribery of judges, employment of counsel to `influence' the court, bribery of the jury, and the involvement of an attorney...in the perpetration of fraud") (footnotes omitted).

Plaintiffs allege numerous acts that they claim constitute fraud on the court sufficient to set aside the judgments involved. These acts include:

> (1) the alleged procurement by Lockheed of a re negotiated contract with plaintiffs through unconscionable conduct, fraud, and duress;
>
> (2) the existence of a conspiracy between Lockheed and other entities to force plaintiffs out of business in violation of the antitrust laws and RICO;
>
> (3) the failure of the trustee in the bankruptcy case of Texas Extrusion Corporation ("TEC") to assert an equitable subordination claim against Lockheed;
>
> (4) the trustee in TEC's bankruptcy case fraudulent under valuation of TEC's antitrust claims against Lockheed;
>
> (5) the breach of fiduciary duty of counsel for Richard Pickens ("Pickens") in failing to submit a proposed plan of reorganization in Pickens' bankruptcy case;
>
> (6) the acceptance by the bankruptcy court, in the confirmed plan of reorganization, of releases and

assignments by Pickens and TEC of their antitrust claims against Lockheed;

(7) *ex parte* contact between the bankruptcy court and the parties -- adverse to plaintiffs in the bankruptcy case -- who drafted the court's findings;

(8) the misrepresentation of the debts of the estate at the confirmation hearings;

(9) the inaccessibility for two years of blueprints relating to patents awarded to Pickens by the bankruptcy court; and

(10) the destruction of machinery at the TEC plant by the purchaser in bankruptcy.

With the exception of the alleged improper *ex parte* contact with the bankruptcy court during the pendency of the plaintiffs' bankruptcy cases, none of the other acts is of a type that might "defile the court" or cause the corruption of, or improper influence on, the court. Accordingly, allegations 1 through 6 and 8 through 10 do not constitute fraud on the court.

The *ex parte* contact complained of in allegation 7 is also insufficient to support a finding of fraud on the court. The Fifth Circuit, in affirming the joint plan of confirmation entered in plaintiffs' bankruptcy case, held that the contact was not prohibited because the bankruptcy judge had announced his findings from the bench prior to the contact, and that the contact was merely for purposes of memorializing such findings. *Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1164 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988).

All of the activities plaintiffs complain of were fully known and adjudicated against plaintiffs in previous proceedings. Plaintiffs are barred by the doctrine of *res judicata* from re litigating their grievances here. Because plaintiffs have not alleged grounds sufficient to justify setting aside the prior judgments under Rule 60(b), F.R. Civ. P., defendants' motion to dismiss is GRANTED.

SO ORDERED.

August 4, 1992

A. JOE FISH
United States

District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1541

IN THE MATTER OF: PAT E. HOLLOWAY, Debtor,

PAT E. HOLLOWAY, Appellant,

versus

DON NAVARRO, TRUSTEE, ET AL.,

Appellees,

Appeal from the United States District Court
for the Northern District of Texas
(CA3-86-3058-K)

(January 3, 1992)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM*.

This court is determined to ensure that the instant appeal is absolutely the final skirmish in the "unrelenting battle between the Brownings and the Holloways, which began in 1979 (and which)

is a familiar fray to the (Fifth Circuit).[1] As a practical matter, this jurisprudential war has long since ended, the sole vestigial problem is, however, that Appellant Holloway, himself an attorney at law, has steadfastly refused (or been unable) to accept that fact. Today we do all within our power to drive home that reality.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens of the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

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1. *Browning v. Navarro*, 826 F.2d 335, 337 (5th Cir. 1987).

First, we dismiss the instant appeal as wholly frivolous and meritless.

Second, we hold that the Appellees are entitled to continue all lawful efforts to enforce their judgments, both pecuniary and proprietary, against Appellant Holloway and any assets, funds, interests and properties of any nature that he may have, and order that such collection efforts, whether in state or federal court, not be impeded or interfered with in any manner whatsoever by or on behalf of Appellant Holloway.

Third, in an act of possible excessive grace--one which we are confident the Appellees will find unduly charitable but which we hope Appellant Holloway will accept as this court's final act of mercy in recognition of his painful sufferings at the hands of the furies which have dogged his psyche for over a decade--we decline to grant the sanctions against Appellant for which Appellees have prayed and convincingly argued to this court. We do so, however, without prejudice to Appellees' right to re-urge the imposition of sanctions should Appellant attempt to act in contravention of the orders and judgment rendered herein.

Fourth, we expressly forbid Appellant to take any actions or file any pleadings concerning any matter or issue of any nature arising from or connected with the litigation or causes of actions heretofore asserted or existing between himself and Appellee Navarro, the Brownings, or any one or more of them. Without first obtaining the express approval of a judge of this court, neither the clerk of this court, nor the clerk of any district court or bankruptcy court within the Fifth Judicial Circuit, shall accept for filing any pleading or other document proffered by or on behalf of Appellant Holloway as to any such matter, including, without limitation, motions for rehearing or rehearing en banc hereto, which we expressly forbid him to file.

We sternly warn Mr. Holloway that, should he exhibit his failure to accept the finality of this litigation, which for more than a dozen years has burdened and abused not only his opponents but also the bankruptcy courts and district courts of the Fifth Circuit, as well as this court, by acting in contravention hereto, he will expose him to the full panoply of sanctions available to this court, including, but not limited to, confinement, disbarment, fines, costs and attorneys' fees. In short, no further act or action by Mr. Holloway in this or any related matter will be tolerated.

The judgment of the district court is AFFIRMED.

THE CONSTITUTION OF THE UNITED STATES

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a state and Citizens of another State; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where

the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

UNITED STATES STATUTES

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C. § 46

§ 46. Assignment of judges; panels; hearings; quorum

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

(As amended Oct. 20, 1978, Pub.L. 95-486, § 5(a), 92 Stat. 1633; Apr.2, 1982, Pub.L. 97-164, Title I, § 205, 96 Stat. 25, 53.)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 1. SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

[Amended effective October 20, 1949; July 1, 1966.]

RULE 52. FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings of fact are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear

in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

RULE 65. INJUNCTIONS

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon released, or discharged, or a prior judgment which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended effective March 19, 1948; October 20, 1949; August 1, 1987.]